No. 78-1054

In the
Supreme Court of the United States

OCTOBER TERM, 1978.

SEALY, INCORPORATED, SEALY SPRING CORPORATION —INDIANA, SEALY SPRING CORPORATION—EAST, SEALY SPRING CORPORATION—WEST, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.

Petitioners,

vs.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, INC., and SEALY MATTRESS COMPANY OF GEORGIA, INC.,

Respondents.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON BEHALF OF CERTAIN SEALY LICENSEES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF CERTAIN SEALY LICENSEES AS AMICI CURIAE

ROBERT H. BORK
142 Huntington St.
New Haven, Connecticut 06511
(203) 624-6027

ROBERT F. HANLEY
RODNEY D. JOSLIN
LANCE E. LINDBLOM
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

In the Supreme Court of the United States

October Term, 1978.

No. 78-1054

SEALY, INCORPORATED, SEALY SPRING CORPORATION —INDIANA, SEALY SPRING CORPORATION—EAST, SEALY SPRING CORPORATION—WEST, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.

Petitioners,

vs.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, INC., and SEALY MATTRESS COMPANY OF GEORGIA, INC.,

Respondents.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON BEHALF OF CERTAIN SEALY LICENSEES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Joseph R. Rudick, the Maryland Bedding Company, Morton H. Yulman, the Sealy Mattress Company of East-

ern New York, Inc., Sealy of Minnesota, Inc., William Walzer, Sealy Connecticut, Inc., Sealy Greater New York, Inc., Waterbury Mattress Co., Walter Hertz, Sealy Mattress Company of New Jersey, Inc., Morris A. Kaplan and the Sealy Mattress Company of Illinois, hereby respectfully move for leave to file the attached brief as amici curiae in support of the petition for a writ of certiorari in this case. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

The individual movants are former members of the Board of Directors of Sealy, Inc., and current officers of Sealy licensees. The corporate movants are Sealy licensees and current stockholders of Sealy, Inc., accounting for approximately 55% of the total outstanding stock.

The movants have an interest in the present case for several reasons: the decision of the Court of Appeals greatly affects the overall operation of the Sealy joint venture in which the movants are participants; the affirmation of a $10 million judgment will diminish the value of movants' stockholdings in Sealy, Inc.; and, movants have been named by respondents in a case filed in the United States District Court for the Northern District of Illinois claiming *inter alia* the same matters litigated in the present case. *Ohio-Sealy Mattress Manufacturing Company, et al.* v. *Morris A. Kaplan, et al.*, No. 76 C 810 (N.D. Ill., McMillen, J., date filed: March 3, 1976)

Movants seek to file a brief as amici curiae because they wish to advance additional legal and constitutional arguments in support of petitioners' request that this Court review and reject the lower courts' formulation of the test to be applied under §1 of the Sherman Act to ancillary horizontal restraints on intrabrand competition imposed by a joint venture without market power in order to

efficiently compete in the interbrand market. In addition, the amici curiae wish to provide for this Court's consideration an alternative legal approach that will meet both the purposes and policies underlying Section 1 of the Sherman Act, and which will give clear and understandable legal guidelines, capable of uniform application, for future business conduct.

For the foregoing reasons the movants respectfully request that they be granted leave to file the attached brief.

Respectfully submitted,

ROBERT F. HANLEY
One of the Attorneys for Movants

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

In the Supreme Court of the United States

October Term, 1978.

No. 78-1054

SEALY, INCORPORATED, SEALY SPRING CORPORATION —INDIANA, SEALY SPRING CORPORATION—EAST, SEALY SPRING CORPORATION—WEST, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.

Petitioners,

vs.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, INC., and SEALY MATTRESS COMPANY OF GEORGIA, INC.,

Respondents.

BRIEF OF CERTAIN SEALY LICENSEES AS AMICI CURIAE

Joseph R. Rudick, the Maryland Bedding Company, Morton H. Yulman, the Sealy Mattress Company of

Eastern New York, Inc., Sealy of Minnesota, Inc., William Walzer, Sealy Connecticut, Inc., Sealy Greater New York, Inc., Waterbury Mattress Co., Walter Hertz, Sealy Mattress Company of New Jersey, Inc., Morris A. Kaplan and the Sealy Mattress Company of Illinois, hereby respectfully file the following amici curiae brief in support of the Petition For Writ of Certiorari filed by Sealy, Incorporated.

Interest of Amici

The amici curiae are Sealy licensees, former directors of Sealy, Incorporated, and present officers of Sealy licensees. The amici curiae have an interest in the present case for several reasons: the decision of the Court of Appeals greatly affects the overall operation of the Sealy joint venture in which amici curiae are participants; the affirmation of a $10 million judgment will diminish the value of amici curiae stock in Sealy, Incorporated; and amici curiae are defendants in litigation filed by respondent claiming many of the same matters litigated in the present case.

REASONS FOR GRANTING THE WRIT

This case was sent to the jury on confused instructions which stated, in effect, that petitioners could eliminate some competition between themselves but could not eliminate too much, and that the jury was to determine whether, on that basis, petitioners had committed a per se violation of the law. This is a "reasonable-mitigation-of-competition" test. Under the guise of a per se instruction the jury was allowed to determine what degree of market division seemed to it permissible. Judgment against petitioners was affirmed by the Court of Appeals for the Seventh Circuit on the same theory.

This Court should review the important questions involving the interpretation of the Sherman Act which arise as a result of the decision of the Court of Appeals which held certain business conduct by a joint venture illegal which would have been lawful if either the joint venture had been integrated by merger rather than by contract, or if the joint venture had been termed "vertical" rather than "horizontal." The decision below renders a severe blow to the Sherman Act's underlying goal of fostering economic competition and enhancing consumer welfare. It also creates enormous difficulties of a constitutional dimension for any business sincerely attempting to conform to the decision's nebulous holding and non-existent guidelines for future conduct. This court should review the important questions presented by this case because the approach of the Court of Appeals adversely affects many joint ventures and similarly organized business units which must necessarily inhibit rivalry between their members for the purpose of fostering internal efficiencies so that these joint ventures can compete with business rivals selling other product brands. By punishing such business organiza-

tions, the overall economic benefit of their competition is lost, and the consumer is injured.

The interpretation of the Sherman Act adopted by the district court and Court of Appeals introduces into the law of market divisions the precise equivalent of the long-rejected "reasonable price" test for horizontal price-fixing agreements. It is a "standard" wholly unsuited for Section 1 of the Sherman Act and, as we shall show, an interpretation that renders the Act void for vagueness so long as any life remains in that constitutional concept.

After this case, the members of business organizations which must necessarily inhibit rivalry between their members in order to compete efficiently in the interbrand market, know only that they may inhibit rivalry internally to some degree, but that the permissible degree can never be known in advance of a jury decision. And even that decision will be binding only as between the parties to that lawsuit. Other juries, at the behest of other plaintiffs, may estimate the degree of desirable internal restraints differently. Thus, there can be no certainty until this Court settles the law.

Amici curiae contend that there are only four possible approaches for the law in this area, two of which are totally inappropriate:

I. Courts faced with territorial inhibitions or restraints associated with joint ventures can adopt, as both lower courts did here, a subjective "reasonable-mitigation-of-competition" test, which, because it is so vague and potentially varying, provides no guidance to anyone. Such an approach is both unsuitable for the Sherman Act's purposes and void for vagueness under the due process clause of the Fifth Amendment.

II. Courts can announce a flat rule of per se illegality for all horizontal restraints. However, since such restraints are essential to vast amounts of legitimate business activity, that rule cannot and will not be uniformly applied. Petitioners should not be held liable under a "rule" that will not be applied to others in identical economic circumstances. Aside from the basic injustice of that result, it would raise serious issues under the equal protection component of the Fifth Amendment's due process clause.

III. Courts could accept the decrees entered in *United States* v. *Sealy, Inc.*, 1967 Trade Cases [CCH] ¶72,327 (N.D.Ill. 1967) and *United States* v. *Topco Associates, Inc.*, 1973 Trade Cases [CCH] ¶74,391 (N.D. Ill. 1973) (final judgment), 1973 Trade Cases [CCH] ¶74,485 (N.D. Ill. 1973) (opinion), *aff'd* 414 U.S. 801 (1973), as stating the balance that the law strikes in this area. Territorial restraints that follow those decrees would be lawful. The sole question for a jury would be whether defendants have gone further than those decrees permit.

IV. This Court can reexamine and modify the rule of illegality for all horizontal restraints announced in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), and hold that naked restraints between competitors are per se illegal but that all territorial restraints ancillary to a lawful joint economic venture are permitted. This would make the law capable of uniform application, save arrangements whose only consequence is increased consumer welfare, and frame a standard that all business men and their lawyers could understand and apply. It would preserve the per se rule and apply it only to business behavior that really is anti-competitive.

Amici Curiae will take up these points in order and will demonstrate, that because the first two approaches are impossible, the law's choice is between the third and fourth.

I.

The "Reasonable-Mitigation-Of-Competition" Test, Employed In This Case, Seriously Misinterprets Section 1 Of The Sherman Act And Would Render It Void For Vagueness.

The jury in this case was effectively instructed that a structure like Sealy's, being a joint venture and not a naked cartel, was allowed some restrictions on the areas in which members might sell, but not to the point that such restrictions resulted in a forbidden market division, which the court said was illegal per se. The general jury verdict against petitioners was affirmed by the Court of Appeals on this same misinterpretation of the statute. That Court upheld the application of a rule in which the jury was told that Sealy could use the contract provisions it did, provided they did not thereby effect a market division. If the jury found that these contract provisions added up to a *de facto* market division, they were told to find that Sealy had committed a per se violation of §1 of the Sherman Act. Such an approach is absurd on its face. The tendency of any of these relevant contract provisions, such as the manufacturing location clause was necessarily to produce some degree of market division.

What the Court of Appeals was really holding was that the degree of market division must not be too much. This is made clear by its statement that the Sealy arrangement would have been lawful if any licensee member could ". . . engage in *significant intrabrand competition at least with neighboring licensees. . .*" *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 828 (7th Cir. 1978) (emphasis added). The only fair meaning of that statement is that, where joint ventures are concerned, some degree of territorial restraint is permissible, perhaps even to the point where competition may be totally eliminated between noncontiguous members of the venture, but with respect to neighboring members lawfulness is a matter of degree summed up in the phrase "significant competition." Under that standard, first Sealy and then the jury is required to guess about how much competition is "significant." However, there are no criteria by which the judgment can be made. It is precisely as if the Sherman Act had adopted the "reasonable price" test for judging the legality of cartels. The sellers' price would go to the jury, be held illegal, and the defendants would have no idea whether lowering the price a nickel would make it reasonable. Similarly, Sealy has no idea what additional degree of porosity of licensee territories must be provided by adjusting license clauses. The jury, instructed as it was in this case, is given unrestrained power to make a judgment of political philosophy. See *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927).

It was for this reason that this Court decided to reject the reasonable-price test in the first case to come before it, saying that such a test "is attended with great uncertainty" so that it would be "exceedingly difficult to formulate even the terms of the rule." *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 331-32 (1897). A year later, in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), Judge (later Chief Justice) Taft rejected the reasonable price test because it had no measure "except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition." *Id.* at 283. "The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it." *Id.* at 284.

Since these cases involved naked price-fixing agreements, and not market allocations ancillary to a joint venture, there is no reason here to adopt their rule of per se illegal-

ity. But the point raised by the cases remains valid, that any so-called standard which requires subjective judgments about how much competition should be eliminated is completely inappropriate to the tasks of the Sherman Act. See *United States* v. *United States Gypsum Co.*, ... U.S. ......, 98 S.Ct. 2864, 2874-76 (1978).

The vagueness of the rule adopted in this case has more than Sherman Act significance, however; it also poses a problem of constitutional dimensions. This Court has repeatedly made that clear, in *International Harvester* v. *Kentucky,* 234 U.S. 216 (1914), *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921), *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927), and, most recently, in *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963).

International Harvester held invalid under the Fourteenth Amendment's due process clause the antitrust laws of Kentucky under which defendant had been convicted for selling harvesters at a price in excess of their "real value." The result, Mr. Justice Holmes pointed out in his opinion for the Court, was to require the defendants to guess what market price would have been if the harvester combination had not been formed and nothing else violently affecting values had occurred. He thought the problem beyond human ingenuity. The "real value" test like the "reasonable price" test had no standards or criteria to guide the defendant or the courts.

In *Cohen Grocery* this Court employed the Fifth and Sixth Amendments to strike down Section 4 of the Lever Act, a federal criminal statute, which provided:

> "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person . . . (e) to exact excessive prices for any necessaries . . ."
> 255 U.S. at 86.

An "excessive price" test, of course, is merely an "unreasonable price" test. Chief Justice White's opinion for the Court stated,

> "[w]e see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."
> 255 U.S. at 89.

The *Cline* opinion, written by Chief Justice Taft, held the Colorado Anti-Trust Act unconstitutionally vague because it made the lawfulness of certain conspiracies and combinations turn upon a determination of "reasonable profit." The Chief Justice quoted at considerable length from his own opinion in *Addyston Pipe & Steel*, demonstrating that his reasons for rejecting the "reasonable price" test there were equally reasons for holding any similar test void for vagueness.

National Dairy Products involved the vagueness of Section 3 of the Robinson-Patman Act, which makes it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." A majority of the Court believed the statute could be saved by giving it a limiting construction, holding that "unreasonably low prices" could be interpreted to mean selling below cost, and that this, combined with the necessity of finding a specific predatory intent, gave the statute sufficient definiteness. Mr. Justice Clark, writing for the majority, concluded that this interpretation avoided the rule of *Cohen Grocery.* Three dissenting Justices did not deny that the majority had given the statute the definiteness required by due process but thought *Cohen Grocery* should be applied to find the law void for vagueness since Section 3 should not be so drastically reconstructed by judicial interpretation.

Sealy is precisely in the situation of the defendants in each of these cases. It has learned, *post hoc*, that, though it allowed selling by members into each other's areas of primary responsibility, it should have allowed more. How much more is not specified, though it seems clear it need not abandon all territorial license restrictions. Sealy could modify its licenses to encourage more selling into neighboring areas of primary responsibility and it would still remain in the position it was in when this case was brought; it would have no idea whether it had allowed enough competition or not, and it would find out only after it had been sued or perhaps indicted and the jury had been permitted to guess. To enforce Section 1 as it has been remade here would, in the words of this Court's *Cohen Grocery* opinion, be to apply a law that said no more than that all acts are illegal "when unjust and unreasonable in the estimation of the court and jury." That is not the application of known law; it is *ad hoc* legislation. The Sherman Act applies the same substantive rules in criminal and civil cases, and the law fashioned by the district court and the Court of Appeals here is void for vagueness under due process standards fashioned and consistently adhered to by this Court. Cf. *United States* v. *United States Gypsum Co.*, ... U.S. ...., 98 S.Ct. 2864, 2874-76 (1978).

Another interpretation of the Sherman Act is, therefore, required by consideration of sound judicial administration, by Sherman Act precedent, and by the due process clause of the Fifth Amendment.

II.

Horizontal Restrictions On Rivalry Within A Joint Venture Are Not, And Should Not Be, Illegal Per Se, And No Rule Making Them Per Se Illegal Can Be Consistently And Constitutionally Applied.

Far from being illegal per se, it is more accurate to say that the law, as it is actually enforced, more nearly treats horizontal restraints between members of joint ventures as per se lawful. Amici Curiae wish to show in this section that the law cannot be otherwise and that any principle of illegality applied to Sealy's licensing arrangements would of necessity rest upon a principle that cannot be consistently applied.

This Court has long recognized that certain horizontal eliminations of rivalry are essential to productive efficiency and thus are lawful. One year after naked horizontal restraints were found per se illegal in *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897), this Court in *United States* v. *Joint Traffic Ass'n.*, 171 U.S. 505, 567-568 (1898), said that this rule does not apply to a partnership agreement or an agreement of competitors to appoint the same person as a selling agent for their goods. This Court no doubt recognized that these activities, which obviously involved the elimination of rivalry between competitors or potential competitors, also involved economic integration which created efficiencies which benefited competition and consumer welfare.

Judge Taft in *Addyston Pipe & Steel* recognized the efficiencies created both by the formation of a joint venture and the additional efficiencies created by restraints ancillary to it. As to the former, he said, "when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community." 85 F. at 280. That is the basic point: almost all economic activity depends upon the integration of individuals and, though some rivalry or competition is lost, it is more than made up for in efficiency which encourages even greater overall competition.

Taft saw also that ancillary horizontal restraints could enhance the efficiency of economic integration: "Restric-

tions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." 85 F. at 280. Obviously, a partnership will not work effectively if one of the partners competes with the partnership.

Reflection shows that this principle is universally applied in the business world. Corporations do not allow their executives to own or manage rival businesses. However, such a restriction is a horizontal restraint on competition. Law firms agree on fields of specialization for their lawyers and often agree that particular partners should handle particular clients. Such agreements amount to division of markets and to customer allocation by the members of a joint venture. Professional sports leagues rest upon a market division agreement which prevents a team in one city from moving into another city in competition with an existing team. This is a horizontal division of territories enforced by a group boycott.[1] This Court has never held any of these activities illegal for the obvious reason that these restraints are essential to the operation of the venture in question. It could never be the policy of the law to demand every last bit of competition without regard to the efficiencies of integration, because such a policy would make all partnerships and corporations illegal.

---

[1] Concerted refusals to deal which are important to the efficiency of organized professional sports have been held lawful under Section 1 of the Sherman Act. See *Smith* v. *Pro Football, Inc.*, 1978-2 Trade Cases [CCH] ¶62,338 (D.C. Cir. 1978), *Deesen* v. *Professional Golfers' Association of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966), and *Molinas* v. *National Basketball Assn.*, 190 F.Supp. 241 (S.D.N.Y. 1961). It is inconceivable that these horizontal restraints could be held illegal per se.

It necessarily follows that horizontal restraints on competition that contribute to the efficiency of an economic unit are essential to free competition and for that reason, must be treated as lawful. They perform the needed function of preventing the economic unit from deteriorating due to the detrimental activities of some members. The ancillary territorial restraints of Sealy, Inc. are not different in their economic effect from any agreed or understood elimination of competition among the members of any other joint venture of the types discussed above. Thus, Sealy should be treated no differently. Yet, if the lower courts' approach to the Sealy joint venture is permitted to stand, Sealy and others similarly situated would be treated differently.

It is obvious that if the lower courts' approach to horizontal restraints were actually enforced consistently, it would be devastating to the economy. It is a reasonable prediction that this will not be done. But if it is not, Sealy and a few other organizations should not be singled out and penalized, perhaps destroyed, on a rule that will not be applied generally. That is elementary in the concept of justice and finds constitutional expression in the equal protection component of the Fifth Amendment's due process clause. It has long been clear, of course, that equal protection may be violated by the unequal application of a rule that appears uniform on its face. See *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Even in the area of economic regulation it should be necessary to state some relevant distinction or at least to show that a legislature has chosen to strike only at part of a more general evil. But even that is not possible here. There is nothing to distinguish Sealy's restraints from those efficiency-creating restraints to be found everywhere in the economic world and none of them, including Sealy's, is harmful.

This argument is more fully developed in amici's next two points.

III.

The Sealy and Topco Decrees Could Be Accepted As Striking The Balance For The Sherman Act As To Restraints Allowable Within Joint Ventures.

The law of joint ventures and agreements ancillary to them has developed in a way that gave Sealy every reason to believe that the license arrangements under attack in this case were completely lawful. Indeed, that belief remains valid and solidly rooted in precedent today. The development of the case law, in response to which the Sealy licensing arrangements were made, is worth recounting because it demonstrates the point.

Though it is now often forgotten, *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), which declared the previous Sealy licensing arrangements illegal, very emphatically did not declare all territorial restrictions in the context of a joint venture illegal. This Court held that, whatever purpose "territorial exclusivity" might serve, the fact of ". . . its connection with the unlawful price-fixing is enough to require that it be condemned as an unlawful restraint and that appellee be effectively prevented from its continued or further use." 388 U.S. at 356-57. What was forbidden was territorial exclusivity, and that only because it had been joined to an agreement to use resale price maintenance. In fact, the Court explicitly held open the possibility that territorial exclusivity itself might be lawful in certain circumstances. 388 U.S. at 357.

Upon remand, then, Sealy sought, and the Department of Justice agreed to, a decree which permitted the use of the licensing arrangements challenged in this case. At that point, Sealy had every reason to think it was in compliance with the law. Considerable doubt was cast upon that when this Court decided *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), which stated explicitly that all

horizontal restraints were illegal and which withdrew the suggestion that, in other circumstances, territorial allocations might be valid. 405 U.S. at 608-12. But, on remand, the district court, over the government's opposition, held that this Court had made a distinction between "reference to the territories in which it was anticipated Topco members would operate" and "the assignment by Topco of exclusive territories to its various members." Some degree of limitation of competition between Topco members was to be permitted, but not rigid territorial exclusivity. The district court permitted, for example, a location clause which permitted Topco to license its trademark only for use at a particular location. This provision is identical in economic effect to Sealy's manufacturing location clause. Indeed, if there is a difference, it is that Sealy's clause, in practical effect, permits selling at greater distances.

We readily concede that, at that point, it was arguable whether or not the district court's reading of *Topco* was correct. It was debatable whether the judge had allowed Topco too much freedom to limit, though not eliminate, rivalry between members using the Topco brand. But the government appealed the *Topco* decree directly to this Court, and this Court, without opinion, summarily affirmed, 414 U.S. 801 (1973). That was, we submit, very reasonably taken as a ruling that, notwithstanding the original *Topco* opinion, some elimination of rivalry between the members of a joint venture, as distinguished from the members of a naked cartel, was permissible, and, further, that the *Topco* decree embodied the proper balance.[2]

---

[2] Summary affirmances are "on the merits, entitled to precedential weight," though not the full weight of a decision after plenary hearing. *Meek* v. *Pittenger*, 421 U.S. 349, 367, n. 16 (1975); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *Richardson* v. *Ramirez*, 418 U.S. 24, 53 (1974).

This affirmance seemed entitled to considerable weight. Certainly, had the original case been about the legality of territorial division between, say, the firms comprising the steel industry—a raw cartel agreement, serving no other purpose than the suppression of competition—this Court would not have summarily affirmed a decree that allowed United States Steel, Bethlehem, Youngstown, Jones & Laughlin, *et al.*, to agree on the locations of their manufacturing plants. Such a result would have been unthinkable and there would have been not summary affirmance but summary reversal. The affirmance, therefore, showed, or certainly was reasonably taken to show, that the law with respect to agreements that made joint ventures possible was different, that some degree of territorial division was legal, that absolute exclusivity was not, and that the *Sealy* and *Topco* decrees, one agreed to by the government and one litigated, stated the proper balance.

This conclusion is reinforced by the consideration, addressed in the preceding section, that a rule making illegal all restraints classified as horizontal because the parties to the agreement could compete, is not a realistic possibility and the law has never been enforced as if it were. That being the case, petitioners here had every reason to think that the *Sealy* and *Topco* decrees state the law applicable to them.

If the *Sealy* and *Topco* decrees state the balance the law has struck, then judgment should have been entered for petitioners because there was no showing that Sealy had gone beyond the bounds marked by the decrees. If the *Sealy* and *Topco* decrees mistakenly allowed restraints that are actually illegal, then, we submit, the rule announced in this Court's *Topco* opinion ought to be reviewed by this Court and modified because of the impossibility of using either a "reasonable-mitigation-of-competition" test or a per se rule. Amici curiae turn to this point next.

IV.

The Rulings Of United States v. Sealy And United States v. Topco Associates, Inc. Should Be Modified To Permit Territorial Restraints Ancillary To A Legitimate Joint Venture And To Use The Rule Of Per Se Illegality For Market-Division Agreements That Are Naked Suppressions Of Competition.

If this Court in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) and in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) held that an agreement to promote and sell common brand products by establishing exclusive sales territories among a group of joint ventures which represented a small share of the relevant market, was a violation of Section 1 of the Sherman Act, then these decisions should be modified to permit restraints ancillary to a joint venture, which is itself lawful, while naked restraints, such as those between firms not engaged in a contract-integrated joint venture, should be per se illegal.

The amici curiae have shown that horizontal restraints on competition among the members of economic integrations are common to every type of economic activity involving more than a single person. We have shown that the law early recognized such restraints as ancillary and stated that they are lawful. Naked restraints, those that do not accompany and make more efficient a lawful joint venture, are the true subject of the rule against horizontal restraints. The distinction we seek to make is illustrated, on the one hand, by a law firm whose members could compete by practicing law separately but practice together and agree on fees they will charge and, on the other hand, by a bar association fee schedule which requires all firms to observe a pre-established fee. This Court has never held the ancillary restraints within a law partnership illegal,

but it has held the naked restraint of a bar association fee schedule per se illegal. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). That is precisely the distinction we ask the Court to make in this case.

Sealy is a joint venture which enhances overall competition and is not a cartel, which exists to suppress competition. No cartel was ever organized with a market share as small as Sealy's and with only one firm in a territory. The Sealy organization is a contract-integrated economic unit. Sealy, Inc. is engaged in the manufacture of bedding products. In addition, it provides its licensees with a wide range of services including national advertising, the development of new and improved products, assistance in engineering and plant layout, sales training, data-processing, labor relations, raw material purchasing and sales to national retail accounts that desire a single-source of supply.

The lawful territorial restrictions of the Sealy system are designed to promote its efficiency, which is beneficial both to Sealy members and to consumers. The Sealy license contract prevents the free rider problem, the elimination of which was recognized by this Court as an efficiency in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The territorial system also creates efficiency as a result of the free circulation of ideas among the joint venture members. Within Sealy there has been a healthy exchange of ideas about superior business practices which continued until recently when the future of the Sealy system came into doubt because of this litigation. This litigation has begun to impair this free exchange of ideas. Certain licensees are now reluctant to disclose to other licensees new and beneficial business practices because of the uncertainty about the future of the license arrangements.

If allowed to occur, this destruction of the free flow of ideas will be a major loss not only to Sealy members but to the consuming public which is benefited by every advance in efficiency.

If the licensing arrangements at issue in this case are destroyed by law, the only way to recapture the lost efficiencies will be by ownership integration created by merger, which may introduce new, unnecessary costs to capture these efficiencies. There is no reason for the law to force this alternative upon the Sealy joint venture, especially if Sealy finds it more efficient and more desirable to integrate by contract rather than merger. For example, Simmons Mattress Co., a competitor of Sealy, owns all of its own plants. Sealy, which has roughly the same share of the national market as does Simmons, uses a joint venture approach. Intrabrand competition would be entirely lost if Sealy were to follow the Simmons example. Yet, Simmons avoids the antitrust problems presented by a joint venture, and the attraction of that solution must seem compelling as long as the lower courts' decisions in this case are allowed to stand.

There exists abundant competition in the bedding products industry. Destroying Sealy's licensing arrangements would not increase that competition; it would decrease it by severely impairing the efficiency of Sealy and others with similar internal arrangements, thereby adversely affecting their ability to compete with other brand producers.

This Court should grant certiorari in this case and modify the *Sealy* and *Topco* decisions and instead apply an ancillary restraint test. The explicit recognition of the rule of ancillary restraints will not involve the courts in any complicated or difficult economic analysis. In fact, the

recognition of the legality of ancillary restraints will simplify the task of the law by permitting classifications that correspond to economic reality. This will avoid further litigation and the doctrinal convolutions that occur when a court feels impelled to uphold an obviously necessary and beneficial horizontal restraint despite the semantic rigors of the current formulas.

In a case such as this one, all the court need do is find that the parties are engaged in a lawful collaborative economic activity, that their internal restraints assist in making their collaboration more efficient, and that they were organized into a group not having an illegally large market share. A finding of the above would compel the conclusion that the purpose and effect of the restraints is not the suppression of competition but the creation of efficiency. This rule of law is simple to apply and will advance rather than retard the basic purposes of the Sherman Act.

Thus, the rule applicable to all horizontal restraints announced in *Sealy* and *Topco* should be modified to permit restraints ancillary to a joint venture which is itself lawful. Naked restraints, those between firms not engaged in a contract-integrated joint venture, as, for example, displayed in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), should, of course, be per se illegal.

Amici Curiae submit that it is essential for the proper interpretation and administration of the Sherman Act that this Court grant petitioners a writ of certiorari in this case to review whether the decision of the lower courts can stand in light of this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* and this Court's grant of certiorari in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, No. 77-1578 and in *American Society of Composers, Authors, and Publishers* v. *Columbia Broadcasting System, Inc.*, No. 77-1583.

CONCLUSION

For all of the reasons stated herein, amici curiae respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Robert H. Bork
142 Huntington St.
New Haven, Connecticut 06511
(203) 624-6027

Robert F. Hanley
Rodney D. Joslin
Lance E. Lindblom
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350